No. 11973.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. C. Simmons,

Appellant,

vs.

Harry C. Westover, Collector of Internal Revenue,

Appellee.

BRIEF FOR APPELLANT.

Latham & Watkins,
Dana Latham,
Henry C. Diehl,
1112 Title Guarantee Building, Los Angeles 13,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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Jurisdiction.

This appeal involves an alleged overpayment of Federal income taxes for the calendar year 1925. The taxes and interest involved, in the amount of $3,159.27, were paid to appellee by appellant on November 14, 1945, and a claim for the refund thereof was filed with appellee by appellant on December 11, 1945.

Thereafter, on June 27, 1946, more than six months having elapsed during which time said claim for refund was neither approved nor rejected, the complaint herein [Tr. 2-6] was filed pursuant to section 24(20) of the Judicial Code as amended (28 U. S. C. A., Sec. 41(20)).

The judgment of the District Court of the United States for the Southern District of California, Central

Division, in favor of the appellee, was entered on April 26, 1948 [Tr. 75], and this appeal is taken pursuant to section 128 of the Judicial Code as amended (28 U. S. C. A., Sec. 225). The Notice of Appeal was filed on June 21, 1948 [Tr. 75] pursuant to Rule 73(a) of the Federal Rules of Civil Procedure.

Opinion Below.

The only previous opinion rendered in this cause is the opinion of the District Court [Tr. 41-67] reported in 76 Fed. Supp. 442.

Issues Involved.

Was the collection, on November 14, 1945, by appellee from appellant of $3,159.27 in Federal income taxes and interest for the calendar year 1925 barred by the statute of limitations on collection with the result that appellant has overpaid his taxes and interest for said year and is entitled to the refund thereof with interest as provided by law.

Statutes Involved.

(1) Section 278 of the Revenue Act of 1926, as amended by the Revenue Act of 1928 (26 U. S. C. A., Internal Revenue Acts, page 209) provides in part as follows:

> "(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such

tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

(2) Section 3770(a) of the Internal Revenue Code (26 U. S. C. A., Sec. 3770(a)) provides in part as follows:

"(2) Assessments and Collections After Limitation Period.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

(3) Section 284 of the Revenue Act of 1926 (26 U. S. C. A., Internal Revenue Acts, p. 220) provides in part as follows:

"(b) Except as provided in subdivisions (c), (d), (e) and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless

before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund."

(4) Section 3772 of the Internal Revenue Code (26 U. S. C. A., Sec. 3772) provides in part as follows:

"(a) LIMITATIONS.—

(1) CLAIM.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) TIME.—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

Statement of Facts.

This proceeding was submitted to the District Court on the pleadings, a stipulation of facts and certain exhibits attached thereto [Tr. 11-40], and the oral testimony of the appellant. The appellee introduced no evidence independent of that contained in the stipulation of facts.

The facts here involved, as revealed by the record and as found by the District Court [Tr. 68-72] may be summarized as follows:

(1) On or about October 19, 1929, there was assessed against the appellant an income tax deficiency for the calender year 1925 in the net amount of $3,472.06, after the allowance of certain credits resulting from overassessments for other years. [Tr. 11, 24, 29, 36 and 41.]

(2) Appellant made payments from time to time until, on August 15, 1933, the balance due on said tax was $1,255.18, exclusive of interest accruing subsequent to October 19, 1929. [Tr. 3, 8, 12, 34, 36, 41 and 69.]

(3) On August 15, 1932, appellant filed with the Collector of Internal Revenue at Los Angeles, California, an "Offer in Compromise" on Treasury Department Form 656, which contained a waiver, with respect to the statute of limitations, which provided that the appellant, "in the event of the rejection of the offer, expressly consents to the extension of any statute of limitations affecting the collection of the liabiltiy sought to be compromised by the period of time (not to exceed two years) elapsed between the

date of the filing of this offer and the date on which final action thereon is taken." [Tr. 12-13, 18-27, 41-42 and 69.] This document will be sometimes hereinafter referred to as "first offer."

(4) This first offer and waiver were filed at the request of the Collector of Internal Revenue. [Tr. 42, 69 and 85.] The waiver was accepted in writing by the Commissioner of Internal Revenue on August 25, 1932 [Tr. 13, 21, 42 and 70], and the offer in compromise was rejected in writing by the said Commissioner on October 18, 1932. [Tr. 14, 28, 42 and 70.]

(5) On July 5, 1933, the appellant executed a Treasury Department form entitled "Tax Collection Waiver," sometimes referred to as an "unlimited waiver," which provided that the taxes assessed for 1925 "may be collected . . . by distraint or by a proceeding in court begun at any time." [Tr. 14, 29, 42 and 70.] The said Tax Collection Waiver was executed at the request of the Collector of Internal Revenue [Tr. 42 and 70], and was accepted in writing by the Commissioner of Internal Revenue on March 5, 1934. [Tr. 14, 29, 42 and 70.]

(6) At the time said Tax Collection Waiver was filed, the statute of limitations on collection of the taxes involved herein, as extended by the waiver contained in the first offer, had two years, five months, and seventeen days yet to run. There was, therefore, no apparent reason for requesting it at that time. There was no consideration for the waiver, since no offers in compromise or other proceedings were pending at that time.

(7) On June 11, 1934, the Collector of Internal Revenue abated as uncollectible the balance of $1,255.18 owed by appellant at that date. [Tr. 34, last line on page.]

(8) On May 21, 1936, appellant filed with the Collector of Internal Revenue at Los Angeles, California, another "Offer in Compromise" on Treasury Department Form 656 which contained a waiver, with respect to the statute of limitations, which provided that the appellant "agrees to the suspension of the running of the statutory period of limitations on assessments and/or collection for the period during which this offer is pending and for one year thereafter." [Tr. 14-15, 30-38, 42-43 and 70-71.] This document will be sometimes hereinafter referred to as "second offer."

(9) This second offer and waiver were filed at the request of the Collector of Internal Revenue. [Tr. 43, 71 and 89.] The waiver was accepted in writing by the Commissioner of Internal Revenue on May 29, 1936 [Tr. 15, 33, 43 and 71], and the offer in compromise was rejected in writing by the said Commissioner on August 9, 1938. [Tr. 16, 38-39, 43 and 71.]

(10) During the period from August 9, 1938, the date on which the second offer of appellant was rejected by the Commissioner of Internal Revenue, to October 9, 1945, the date on which demand for payment was made by appellee, there were no offers in compromise pending or under consideration by the Bureau of Internal Revenue [Tr. 16, 43, 71-72 and

90-93], the appellant had no correspondence or conferences with the Government concerning the taxes involved herein, and the appellee made no attempts to collect said taxes from the appellant. [Tr. 43, 72 and 90-93.]

(11) On October 9, 1945, the appellee made demand upon the appellant for the payment of the balance of said taxes plus interest [Tr. 16, 43 and 72] and on November 14, 1945, the appellant paid to the appellee said balance of $1,255.18 together with interest in the amount of $1,904.09, or a total of $3,159.27. [Tr. 3, 7, 16, 43 and 72.]

(12) On December 11, 1945, the appellant filed with the appellee a claim for the refund of said tax and interest and on June 27, 1946, after more than six months had elapsed, during which time said claim was neither approved nor rejected, the complaint herein was filed. [Tr. 3-6, 10, 43 and 72.]

(13) In the absence of a waiver of the statute of limitations, the collection of the taxes involved herein would have been barred by section 278(d) of the Revenue Act of 1926, *supra,* on October 19, 1935, six years from the date of assessment of said taxes.

(14) The first offer, by its terms extended the statutory period of limitations on collection two months and three days, the time elapsed from the date of filing, August 15, 1932, to the date of rejection, October 18, 1932.

(15) The second offer, by its terms, suspended the running of the statutory period of limitations on col-

lection for three years, two months, and nineteen days, the time elapsed from the date of filing, May 21, 1936, to the date of rejection, August 9, 1938, plus one year.

(16) The appellant's case in the court below was based upon the allegation that the collection of the tax was, on and before November 14, 1945, barred by the statute of limitations on collection and that the payment thereof constituted an overpayment which should be refunded. [Tr. 3.]

(17) The appellee's defense in the court below was based upon the allegation that the appellant had waived the statute of limitations and that the collection of the tax was, therefore, not barred on November 14, 1945. [Tr. 10.]

(18) Unless the Tax Collection Waiver [Tr. 29] was in effect on November 14, 1945, the collection of said tax and interest was clearly barred by the statute of limitations, for the reason that the six-year period provided for by section 278(d) of the Revenue Act of 1926, *supra,* as extended by the first offer, had expired on December 22, 1935. The decision in this case is, therefore, dependent entirely upon a determination as to the validity and/or effect, as of November 14, 1945, of said Tax Collection Waiver.

Specification of Errors.

(1) The District Court erred in concluding that the Tax Collection Waiver executed by appellant on July 5, 1933, was valid. Said waiver did not conform to the provisions of law authorizing waivers in that it purported to waive the statute for all time, whereas section 278(d) of the Revenue Act of 1926 as amended, *supra,* requires that waivers be for a definite period.

(2) Assuming, but not conceding, that the Tax Collection Waiver of July 5, 1933, was not void *ab initio,* the District Court erred in concluding that said waiver was not revoked, superseded, or terminated by the execution and acceptance of the waiver contained in the Offer in Compromise filed on May 21, 1936.

(3) Assuming, but not conceding, that the Tax Collection Waiver of July 5, 1933, was not void *ab initio* and, further, that it was not revoked, superseded, or terminated by the waiver of May 21, 1936, the District Court erred in finding that no unreasonable time elapsed prior to the date when the Government collected the taxes herein involved from the appellant, and in concluding that said Tax Collection Waiver was not rendered inoperative by the lapse of time. The period of more than sixteen years from the date of assessment, October 19, 1929, to the date of collection, November 14, 1945, was manifestly unreasonable and the District Court's finding of fact on this point is wholly unsupported by the evidence.

(4) The District Court erred in concluding that the collection of the taxes involved was not barred by the statute of limitations. The six-year statutory period plus

any and all valid extensions thereof expired many years prior to the date of collection.

(5) The District Court erred in concluding that the appellant has not overpaid the taxes and interest involved herein and is entitled to no relief by his complaint. The payment of taxes after the expiration of the statutory period of limitations constitutes an overpayment as defined by section 3770(a)(2) of the Internal Revenue Code, *supra*.

(6) For all the reasons above set forth, the District Court erred in entering judgment against the appellant and in favor of the appellee.

Summary of Argument.

The taxes involved herein were assessed on October 19, 1929. They were collected on November 14, 1945. The applicable statutory period of limitations expired on October 19, 1935. Unless the statute of limitations was extended by waiver to November 14, 1945, the payment constitutes an overpayment which must be refunded.

Appellant executed and the Commissioner accepted three purported waivers. The first and last contained definite time limitations but the second—the Tax Collection Waiver of July 5, 1933—purported to waive the statute of limitations for all time.

Giving the limited waivers their maximum possible effect, the statutory period of limitations as extended would have expired more than six years prior to the date the taxes were collected; hence our argument will be confined to the question of the validity and effect of the Tax Collection Waiver of July 5, 1933. The discussion will

cover not only the date when given, July 5, 1933, but also the date of collection more than twelve years later, November 14, 1945. This argument will be presented in three alternatives, a favorable decision on any one of which will compel a reversal of the judgment of the District Court. They are as follows:

1. The Tax Collection Waiver of July 5, 1933, was void *ab initio,* hence of no effect at any time.

2. The Tax Collection Waiver of July 5, 1933, if not void *ab initio,* was revoked, superseded, or terminated by the filing and acceptance of the limited waiver contained in the Offer in Compromise filed on May 21, 1936.

3. The Tax Collection Waiver of July 5, 1933, if neither void *ab initio* nor superseded and terminated by the subsequent, limited waiver, was effective only for a reasonable length of time and the time which elapsed from the filing thereof until the collection of the taxes—more than twelve years—was manifestly unreasonable.

Outline of Argument.

A. LEGISLATIVE HISTORY AND GENERAL PRINCIPLES.

B. THE TAX COLLECTION WAIVER OF JULY 5, 1933, WAS VOID *AB INITIO.*

C. THE TAX COLLECTION WAIVER OF JULY 5, 1933, WAS REVOKED, SUPERSEDED, OR TERMINATED BY THE SUBSEQUENT LIMITED WAIVER.

D. THE TAX COLLECTION WAIVER OF JULY 5, 1933, WAS EFFECTIVE ONLY FOR A REASONABLE TIME, AND THAT PERIOD EXPIRED LONG PRIOR TO NOVEMBER 14, 1945.

ARGUMENT.

A. Legislative History and General Principles.

Prior to the Revenue Act of 1918, there was no limitation on the time within which taxes might be collected. Section 250(d) of that Act provided a limit of five years from the due date of the return upon both assessment and collection of the tax. Section 250(d) of the 1921 Act contained a similar provision but measured the time from the filing date instead of the due date of the return.

The 1924 Act contained separate limitation provisions for assessment and for collection, the latter being covered by Section 278(d) which provided for collection "by distraint or by a proceeding in court, begun within six years after the assessment of the tax."

Section 278(d) of the 1926 Act provided for collection by distraint or by a proceeding in court, "but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer." This section of the 1926 Act is, by its terms, applicable to taxes for 1925.

The 1928 Act changed the section number to 276(c), added the sentence providing for the extension of the agreed period, and there has been no change in the section since that time. See Historical Note to 26 U. S. C. A., Sec. 276 and volume "Title 26, Internal Revenue Acts."

The House version of the Revenue Act of 1924 contained no limitation on collection. The Ways and Means

Committee Report, found in Cumulative Bulletin, 1939-1 (Part 2), page 241, explains their attitude on this subject as follows, at page 260:

> ". . . The purpose of a limitation upon assessments is to assure the taxpayer that, after the period has run and no assessment has been made, no taxes may be collected from him. If, however, the assessment is made within the prescribed period, the assessment is comparable to a judgment at law and should remain alive until the tax is paid."

However, the Senate version, to which the House acquiesced, inserted the six-year limitation, with the following explanation by the Finance Committee in its report at page 288 of the above-mentioned Bulletin:

> ". . . This subdivision in the House bill authorized the collection at any time. . . . In order to protect the taxpayer further, a limitation of six years after the assessment of the tax has been placed upon proceedings in court and distraint for its collection. At the end of such period, the taxpayer is assured that his tax liability is finally determined."

The intention of Congress to suppress stale tax claims is obvious.

The purpose of a statute of limitations is to suppress and eliminate stale claims and the question whether the claim had any merit in the first instance is immaterial.

37 C. J. 684.

A written instrument is to be construed most strongly against the party preparing it and this rule is peculiarly applicable where a printed form is used.

17 C. J. S. 751.

It is a well settled principle of income tax law that doubts as to a waiver's effectiveness must be resolved against the government.

D. J. Gay v. Commissioner, 31 B. T. A. 580, 581 (1934);

Union Shipbuilding Co. v. Commissioner, 43 B. T. A. 1143, 1147 (1941).

The court below dismisses the *Gay* and *Union Shipbuilding* cases with the comment that they differ on their facts and are of no assistance in determining the issues herein. [Tr. 46.] It is true that the facts are not parallel, but that does not affect the force of the general rule of law expounded therein that doubts as to a waiver's effectiveness must be resolved against the government.

The court then proceeds to a brief discussion of cases which hold that statutes imposing limitations upon action by the United States are to be construed in favor of the government.

It is immediately obvious that the court missed the point. We are not here concerned with the construction of a statute but with the construction and interpretation of a written instrument purportedly authorized by the statute. The *statute* is to be construed in favor of the government but the *document* is to be construed in favor of the taxpayer.

B. The Tax Collection Waiver of July 5, 1933, Was Void Ab Initio.

The applicable statute of limitations, section 278(d) of the Revenue Act of 1926, *supra,* provides for collection within six years after assessment or "prior to the expiration of any *period* for collection agreed upon in writing by the Commissioner and the taxpayer." (Italics supplied.)

"Period" is defined by Webster's New International Dictionary, Unabridged Second Edition (1947) as "a portion or division of time. Specif.: A portion of time as limited and determined by some recurring phenomenon, as by the completion of a revolution of a heavenly body; a division of time, as a series of years, months, or days in which something is completed, and ready to recommence and go on in the same order." It is defined by Bouvier's Law Dictionary as "a stated and recurring interval of time" and by Funk & Wagnalls Practical Standard Dictionary as "a definite portion of time marked and defined by some recurring event or phenomenon."

It follows, therefore, that for a waiver to be valid under the applicable law it must be definite in duration. The Tax Collection Waiver of July 5, 1933, was not; hence it was void *ab initio* because not authorized by the statute.

This precise question, under the law here applicable, has apparently not been heretofore decided. It is respectfully submitted that this court should do so and should determine the issue in appellant's favor for the reasons set forth above.

The court below bases its adverse decision on this point primarily on the absence of cases in support of appellant's contention. It is submitted that the absence of precedent

should not deter this court in deciding the issue as it clearly should be. The court does cite *Cunningham Sheep & Land Co.*, 7 B. T. A. 652 (1927), but that case arose under the 1921 Act which provides that the taxpayer and the Commissioner may consent in writing to "a later determination" and says nothing about collection within a "period" agreed upon. The applicable law was, therefore, quite different from that involved here.

The lower court also appears to accept appellee's statement on brief that at the time the Tax Collection Waiver was executed there was no statute providing in what manner or for what period the statute of limitations on collection may be waived. This statement is in error. All acts, since waiver provisions first appeared in 1921, have stated that the waivers shall be in writing and, beginning with the 1924 Act as amended the period provided for is that agreed upon—but it must be for some "period" and not for an indefinite time.

C. The Tax Collection Waiver of July 5, 1933, Was Superseded and Terminated by the Limited Waiver of May 21, 1936.

Assuming, but not conceding, that the Tax Collection Waiver of July 5, 1933, was not void *ab initio*, it was effectively superseded and terminated by the limited waiver contained in the second offer in compromise filed on May 21, 1936. (In this connection it must be borne in mind that while the second *offer* was ultimately rejected by the Commissioner, the *waiver* contained therein was accepted by him in writing.)

The two waivers covered the same subject matter, that is, income taxes assessed for the year 1925. They were inconsistent in their terms; the 1933 waiver purported to

waive the statute for all time, whereas the 1936 waiver was effective only for the period during which the offer in compromise was being considered plus one year. They were between the same parties, to wit, the appellant, and the Commissioner.

The Commissioner accepted the 1936 waiver with knowledge of the existence of the 1933 waiver, as indicated by the fact that a copy of the latter was attached to the former in the Commissioner's files. [Tr. 38.] If he had not intended that the 1936 limited waiver should supersede the 1933 unlimited waiver, he would not have accepted the later waiver. It is not to be presumed that the act of signing was meaningless. Furthermore, the 1936 offer containing the limited waiver was filed by appellant at the request of the Government. The intention of the parties is clear.

A case in point is *Helvering v. Ethel D. Co.,* 70 F. 2d 761 (1934), in which the court discusses the principle at some length. As stated by the court in that case:

> "* * * If the Commissioner was satisfied that it [the so-called unlimited waiver] conformed to the requirements of the law and rules in relation to waivers and that it was effective to extend indefinitely the time of making the assessment, it was obvious that the second waiver added nothing to what the government already had. Notwithstanding this, the evidence shows the second waiver was accepted and agreed to by the Commissioner."

The court then went on to apply the invariable rule that where two writings between parties covering the same subject matter are inconsistent with one another, the later one rescinds, supersedes and is substituted for the earlier

one and becomes the only agreement between the parties on the subject.

To the same effect is *Farmers Union State Exchange*, 30 B. T. A. 1051, at 1066 (1934), where the Board said:

> "The two waivers must be construed together. * * * To say that the first waiver remained in effect after the execution of the second waiver, under the circumstances set out, would be equivalent to brushing aside the meaning of the later waiver. It must have been intended that the second waiver should be substituted for the unlimited waiver."

The above quoted language can and should be applied to our case without change. The 1933 and 1936 waivers covered the same subject matter between the same parties and were inconsistent in their terms. Therefore, the later, limited waiver must be held to have rescinded, superseded, and been substituted for the earlier, unlimited waiver.

Any other conclusion would render meaningless the joint act of the parties and such a result is not to be presumed. This is particularly true where, as here, the form of agreement used is a printed from provided by the Government and is filed at the Government's request. As heretofore pointed out, the effect thereof shall be construed most strongly against the party which provides the document.

The lower court again misses the point when it dismisses the case of *Atlantic Mills of Rhode Island v. U. S.*, 3 Fed. Supp. 699 (1933), cited on brief below, with the comment that the issue therein is not present in this case. [Tr. 47.] That case was and is cited on the simple proposition that a waiver is not effective until signed by the

Commissioner. True, all waivers involved herein were so signed, and that is just the point.

If the limited waiver of May 21, 1936, had not been signed by the Commissioner, it would have been of no effect and the unlimited Tax Collection Waiver of July 5, 1933, would have continued in effect (assuming for the sake of this argument that it did not fall or expire for one of the other reasons advanced by this brief); but the Commissioner did sign, and in so doing performed an act which is required in order to give effect to the instrument. The only possible effect of the limited waiver was to revoke, terminate and supersede the unlimited waiver. Consequently, the obvious—in fact, the only—conclusion to be drawn from these facts is that the Commissioner, having performed an affirmative act, must have intended it to be effective.

Proceeding from the foregoing, it is a matter of simple calculation to determine that the statute of limitations on the collection of the taxes involved herein expired not later than August 9, 1939, more than six years prior to the date of collection.

The court below quotes at length from *U. S. v. Fischer,* 93 F. 2d 488 (1937) and *Atlantic Mills of Rhode Island v. United States, supra,* and concludes therefrom that the unlimited waiver was not terminated *"by the giving"* of the limited waiver. (Italics supplied.)

The appellant does not contend that *the giving* of the limited waiver terminated the unlimited waiver, but the appellant does contend that the joint act of appellant and the Commissioner in *executing and making effective* the limited waiver did revoke, terminate, and supersede the unlimited waiver.

In the *Atlantic Mills* case, *supra,* it was held that the giving of a waiver, which was not signed by the Commissioner, did not constitute a notice by the taxpayer of termination of a prior unlimited waiver. In our case, the limited waiver was given to and signed by the Commissioner, thus presenting an entirely different situation. A definite period was set by agreement in our case whereas the Commissioner refused to do so in the *Atlantic Mills* case.

The *Fischer* case, *supra,* involved two limited waivers rather than an unlimited one followed by a limited one, as in our case, which is a distinguishing feature. But more important is the difference in the circumstances under which the waivers were given in the two cases. In the *Fischer* case the first waiver was given in connection with an offer in compromise and held the statute open while the government considered the offer. The second waiver was executed subsequently, not in connection with an offer, and, so far as the case reveals, totally unrelated to the offer already on file. The government was still considering the offer when the time set by the second waiver expired. The Circuit Court ruled that, under the circumstances, the second did not supersede the first.

In our case, when the unlimited waiver was given on July 5, 1933, no offer or other proceeding was pending and the government had two years, five months and seventeen days left in which to collect the tax without further waivers. Furthermore, on June 11, 1934, three months after the Commissioner signed the waiver, the government wrote the appellant's account off its books, indicating it was no longer interested in trying to collect. The balance was abated nearly a year and a half before the un-

extended six-year statutory period of limitations would have expired. There was, then, no need for a waiver at that time. On the other hand, the subsequent limited waiver was filed in connection with an offer in compromise and served a definite purpose in protecting the government while it considered the offer. The situation was just the reverse of that in the *Fischer* case, and it is submitted that the decision should be the reverse, also.

Of course, the appellee will argue that waivers are unilateral undertakings, are not contract, and require no consideration; hence the foregoing differences in circumstances are immaterial. That the circumstances are material is indicated by the *Fischer* case where the court points out, at page 489, that "The defendant obtained consideration of his compromise offer by agreeing that the statute of limitations should be extended as therein provided."

The court below would let the government have its cake and eat it too, judging from the following quotation from the opinion [Tr. 56]:

> ". . . It is logical to assume that when the Commissioner requested the third waiver, he intended to secure a fixed period within which he might consider the compromise offer and investigate the financial status of the taxpayer, during which period, in the event the taxpayer filed notice of termination of the unlimited waiver, the Commissioner would not be left without a waiver."

We agree that the Commissioner intended to secure a fixed period, but do not agree that he did not thereby relinquish the unlimited waiver. One waiver is sufficient to

protect the government. Why should it be permitted to insist on two?

By its terms, the last waiver gave the government a full year in which to act after the offer was rejected. In this connection it should be borne in mind that collection does not have to be accomplished within the time limit. The statute is satisfied if proceedings are begun, by distraint or suit in court, within that time. Thus the government could have protected itself fully at any time prior to the expiration of the statute as extended by filing suit and obtaining a judgment against the appellant.

D. The Tax Collection Waiver of July 5, 1933, Was Effective Only for a Reasonable Time.

Following the principle of contract cases that where time for performance is not specified a reasonable time will be allowed, the Board of Tax Appeals many years ago adopted the rule that waivers which are not limited as to time give the government a reasonable time within which to act.

Herman Frost v. Commissioner, 23 B. T. A. 411 (1931);

Nathan Loeser v. Commissioner, 27 B. T. A. 601 (1933).

Those cases, and earlier cases cited therein, held periods of time varying from one and a half years to five and a half years to be reasonable. In all of the cases refund claims, protests, or litigation were pending and these pending matters had to be settled before proper tax liability could be determined. It was therefore held in each case that, in view of these circumstances, the time which had elapsed was not more than a reasonable time.

In our case the elapsed time from the date of filing of the second or so-called unlimited waiver, to the date of collection of the tax amounts to twelve years, four months and nine days, during the last seven years, three months and five days of which time there were no proceedings of any sort had or pendnig between the plaintiff and the government.

If we consider only the period from the expiration of the statute as extended by the first waiver, or December 22, 1935, to the date of payment of the tax, we find that the elapsed time was almost ten years. This is obviously more than a reasonable length of time when it is noted that no proceedings were pending during more than seven years of this period.

The defendant will, of course, cite *Greylock Mills v. Commissioner,* 31 F. 2d 655 (C. C. A. 2, 1929), as authority for the rule that the so-called unlimited waivers continue in effect until reasonable notice of termination has been given by either party.

This statement by the court was pure dictum, the decision of the Board of Tax Appeals having already been upheld upon the basis of its finding of fact that the period of time was reasonable. The rule propounded cannot, therefore, be considered as binding.

No case has ever been decided solely on the basis of this rule. Other circuit courts have expressly refused to accept or reject it, *Greylock Mills v. White,* 63 F. 2d 866 (C. C. A. 1, 1933). In *Helvering v. Ethel D. Co., supra,*

the Circuit Court of Appeals for the District of Columbia, after quoting from the Second Circuit's opinion to the effect that notice was required, stated that it was "disposed to think that the waiver would fall of itself after a reasonable time" without the necessity of notice by either party.

We think the proper rule and the one which the Second Circuit would have adopted if the question had been necessary to the decision of its case and had been carefully considered, is as stated in *Farmers Union State Exchange v. Commissioner, supra,* that "an unlimited waiver does not suspend the running of the statute forever, but only for a reasonable time or until termination by either party upon reasonable notice." In other words, such a waiver is good for a reasonable time *unless terminated sooner* upon notice by either party.

In our case it is submitted that the length of time during which the second waiver must have been effective in order for the defendant to prevail was so extremely long that the waiver must have long since fallen of its own weight and that no notice by the taxpayer was necessary.

A decision that the 1933 waiver fell of its own weight after a reasonable time will recognize the expressed intent of Congress "to protect the taxpayer."

The court below found as a fact that no unreasonable time elapsed. [Tr. 72.] There is no evidence in the record to support such a finding. In fact, the evidence is all to the contrary, as pointed out above.

Conclusion.

In conclusion, appellant respectfuly submits that the decision and judgment herein should be reversed for the reason that the collection of the taxes herein involved was, on November 14, 1945, the date of payment by the appellant, barred by the provisions of the applicable statute of limitations.

Respectfully submitted,

LATHAM & WATKINS,
By DANA LATHAM,
HENRY C. DIEHL,
Attorneys for Appellant.